Editor's note: Reconsideration denied by Order dated May 31, l994.

CITIZENS COAL COUNCIL
WATER INFORMATION NETWORK
THE DINEH-HOPI ALLIANCE

IBLA 94-282 Decided April 19, 1994

Appeal from the decision of the Acting Director, Office of Surface Mining Reclamation and Enforcement, affirming an interim response by the Albuquerque Field Office to complaints concerning a surface coal mining operation. 94-10-Johnson.

Motion to dismiss denied; decision affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Appeals: Generally--Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: Indian Lands: Generally--Surface Mining Control and Reclamation Act of 1977: Permits: Generally

When OSM inspects a surface coal mining operation in response to an inspection request, it is required by 30 CFR 842.12(d)(1) to send to the person requesting
the inspection within 10 days thereafter a description of the enforcement action taken or an explanation why
no enforcement action was taken. An explanation that
no enforcement action was taken because more time was needed to review the matter will be affirmed if the explanation is reasonable and does not result in undue delay.

APPEARANCES: Walton D. Morris, Jr., Esq., Charlottesville, Virginia, for appellant; James R. Bird, Esq., Benjamin J. Vernia, Esq., Washington, D.C., and Michael H. Hyer, Esq., Flagstaff, Arizona, for Peabody Western Coal Company; Jack D. Palma II, Esq., Lynnette J. Boomgaarden, Esq., Cheyenne, Wyoming, and Donald D. Atkins, Esq., Tulsa, Oklahoma, for Black Mesa Pipeline, Inc.; Jon K. Johnson, Esq., Office of the Solicitor, Denver, Colorado, for the Office of Surface Mining Reclamation and Enforcement;
John B. Weldon, Jr., Esq., Stephen E. Crofton, Esq., Phoenix, Arizona,
for the Salt River Project.

OPINION BY ADMINISTRATIVE JUDGE KELLY

The Citizens Coal Council, the Water Information Network, and the Dineh-Hopi Alliance have appealed from the December 13, 1993, decision of the Acting Director, Office of Surface Mining Reclamation and Enforcement

(OSM), affirming the Albuquerque Field Office's November 12 interim response to their complaints concerning the Black Mesa/Kayenta Mining complex operated by Peabody Western Coal Company.

These complaints were filed on October 25 and November 1, 1993, and alleged that operating the railroad, pipeline and the main access road without a surface coal mining permit constituted violations of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (1988). The interim response advised appellants that an inspection had been conducted on November 3, but additional time was needed to "complete the technical investigations involving impacts on water and vegetation" and to "complete the administrative and legal review of [OSM's] policy for permitting transportation facilities." Subsequently, on February 25, 1994, the Acting Director, OSM, rendered a decision on the complaints, concluding that OSM will not exercise jurisdiction over the facilities in question. Appellants have also filed an appeal of that decision, docketed as IBLA 94-366, but that appeal is not the subject of this decision.

Within 10 days after conducting its inspection, OSM was required to send to the complainants a description of the enforcement action or an explanation as to why no enforcement action was taken. 30 CFR 842.12(d)(1). Thus, the sole issue before us is whether OSM's interim response of November 12 satisfies this regulatory requirement. For the reasons set forth below, we hold that it does.

OSM has moved to dismiss this appeal, arguing that it has become moot by the Acting Director's February 25, 1994, decision. We have held that an appeal will not be dismissed as moot where the issues raised by the appeal are capable of repetition and where the failure to decide the appeal would cause substantial issues to evade review. Southern Utah Wilderness Alliance, 114 IBLA 326 (1990); Southern Utah Wilderness Alliance, 111 IBLA 207 (1989); Colorado Environmental Coalition, 108 IBLA 10 (1989). We find this case meets the above conditions because the issue of the construction of 30 CFR 842.12(d)(1) is a substantial issue that is capable of repetition and would otherwise go unaddressed.

Pursuant to 43 CFR 4.1114, appellants have filed a motion for advancement of these proceedings. The Board, sua sponte, has expedited consideration of this appeal, and we make no ruling on whether the requirements of 43 CFR 4.1114 have been met.

Appellants assert that 30 CFR 842.12(d)(1) is not satisfied by OSM's response that it needs more time to review its policy on permitting transportation facilities. Instead, appellants contend that the "explanation" must be a final "appealable, determination that enforcement action is effectually or legally inappropriate." Appellants contend that the proper course for OSM is to allow its inspector to issue an imminent harm cessation order (CO). We disagree.

OSM cannot avoid its regulatory obligation simply by saying that it wants more time to consider a question. The regulation requires OSM to send

to the complainant an explanation of its action or inaction and an explanation of the complainant's right, if any, to informal review. Nevertheless, that regulation does not expressly require OSM to determine whether a violation has occurred. Appellants' construction of the regulation would place OSM in the untenable situation of either taking enforcement action or issuing a final determination not to take enforcement action, either of which would be based on incomplete or missing information. The regulation upon which appellants rely, however, does not bear the weight of their interpretation. It does not expressly require OSM to determine whether a violation has occurred but only requires it to explain why no enforcement action is being taken. If that explanation is reasonable and does not result in undue delay, it should be affirmed. In this case, the explanation given by OSM appears to be reasonable, and OSM's issuance of its decision on February 25 does not indicate that consideration of the merits of the complaints was unduly delayed.

To the extent appellants have raised other arguments not specifically addressed herein, they have been considered and rejected.

Therefore, pursuant to authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the motion to dismiss is denied, and the decision appealed from is affirmed.

John H. Kelly
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge